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RECORD, CASE NO. 13970.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 655.

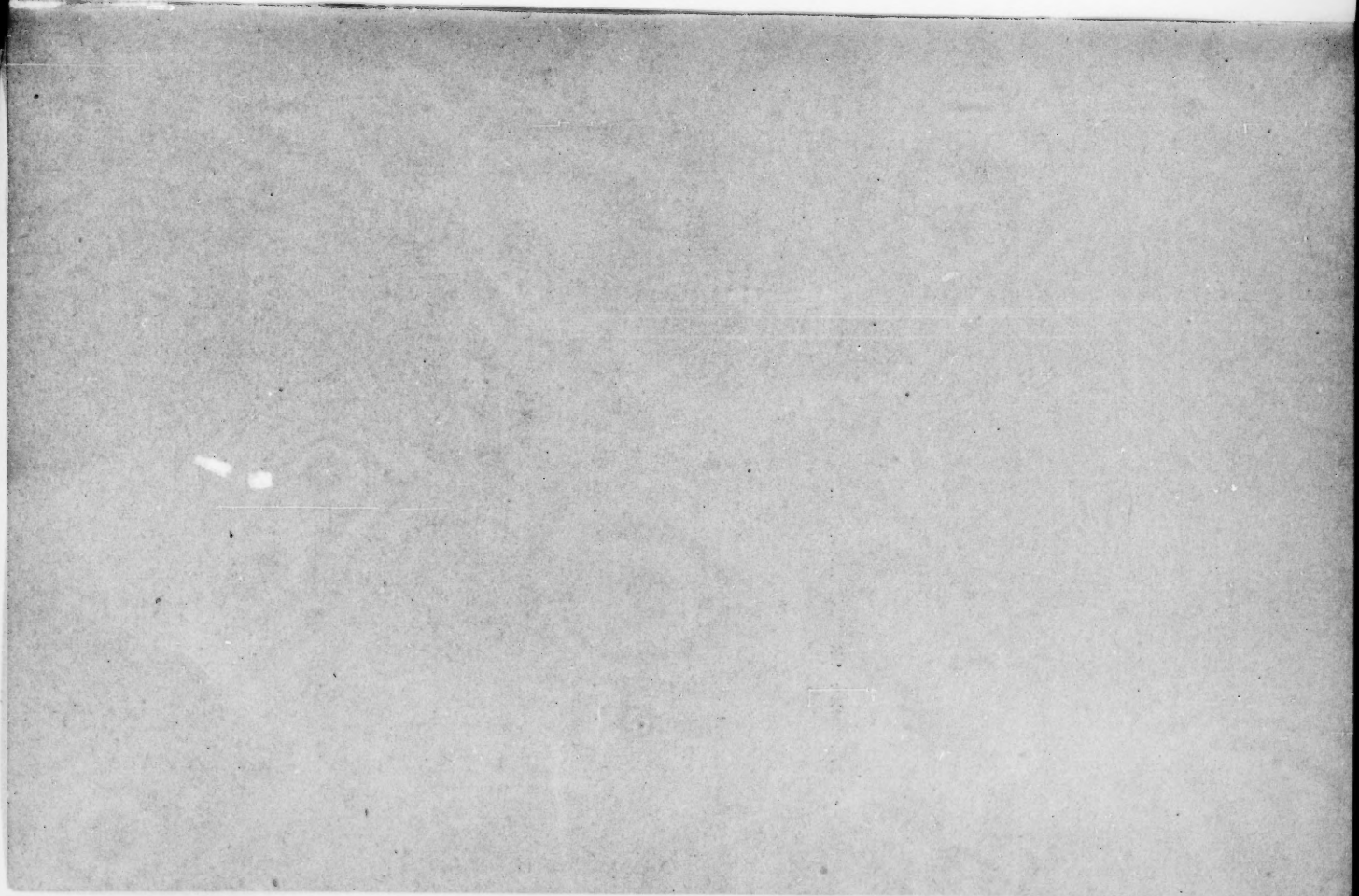
T. G. PHELPS, UNITED STATES COLLECTOR OF CUSTOMS, PLAINTIFF IN ERROR,

vs.

J. C. SIEGFRIED AND M. J. BRANDENSTEIN, DOING BUSINESS AS PARTNERS UNDER THE FIRM NAME AND STYLE OF SIEGFRIED & BRANDENSTEIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED FEBRUARY 19, 1890.



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1 *Complaint.*

In the United States circuit court, ninth circuit, northern district of California.

JOHN C. SIEGFRIED AND M. J. BRANDENSTEIN, doing business as partners under the firm name and style of Siegfried & Brandenstein, plaintiffs,
vs.
T. G. PHELPS, UNITED STATES COLLECTOR OF customs of the port and district of San Francisco, defendant.

Now come the plaintiffs and complain of defendant, and for cause of action allege as follows:

I.

That heretofore at all the time and times hereinafter mentioned the said plaintiffs were and still are residents of said district and merchants and importers, doing business at the city of San Francisco, State and
2 district of California aforesaid, as partners under the firm name and style of Siegfried & Brandenstein, and said defendant was and still is the duly appointed, commissioned, qualified, and acting United States collector of customs of and for the port and customs district of San Francisco, California.

II.

That on or about the 7th day of August, 1889, said plaintiffs in the due course of their business imported from Yokohama, Empire of Japan, and brought into the port of San Francisco aforesaid, certain merchandise, to wit: Ten packages of tea, known and marked as "Pride of Japan," which said tea was and still is the property of plaintiffs, and was and is of the value of two hundred dollars in U. S. gold coin.

III.

And plaintiffs allege that at all the times herein mentioned there was not, nor is there now, any customs duty imposed by law upon said merchandise, nor is there any authority of law requiring, or any
3 authority on the part of said defendant to demand, any "consular invoice," or "consular certificate," or any bond or other obligation to produce a consular invoice or consular certificate for, of, or concerning said merchandise, in order to obtain the entry thereof in said custom-house and the delivery thereof to plaintiffs, the owners thereof.

But it was and is the duty of said defendant, collector as aforesaid, to allow the entry of said merchandise and deliver the same to plaintiffs upon the presentation to him of the bill of lading for said merchandise, and the proper identification of plaintiffs as the owners thereof.

IV.

And plaintiffs aver that on the 7th day of August, 1889, during the regular business hours of said day, between the hours of nine a. m. and three p. m. thereof, plaintiffs made a demand on said defendant, as such collector, at his office at the custom-house at San Francisco, aforesaid, for said goods, accompanying said demand with the proper bill of
4 lading and the proper and legal evidence of their ownership of said goods, and then and there demanded that the same be delivered to them.

V.

And plaintiffs further allege that before the commencement of this action, to wit, on said 7th day of August, 1889, they complied with all the requirements of the law in the premises, and made the necessary oaths and proofs and paid the requisite fees, and were then and there and still are entitled to have said goods entered and delivered to their possession.

VI.

And plaintiffs further allege that defendant then and there refused to allow the entry of said merchandise or to deliver the same or any part thereof to plaintiffs, and still refuses so to do, except upon the condition that plaintiffs should deliver to defendant a consular invoice from the United States consul at the said port of Yok'ama, Japan, declaring the cost or value of said merchandise in Japan, or in lieu thereof that
5 plaintiffs should execute and deliver to defendant a bond, undertaking that within a time fixed by defendant they would procure and deliver to him said consular invoice, or upon the failure so to do to forfeit the amount of said bond in the sum of one hundred dollars; and plaintiffs aver that defendant had not nor has he any authority of law to impose said conditions upon plaintiffs.

And plaintiffs did then and there refuse to comply with said unlawful demands and conditions, but demanded and still demands the delivery to them of said merchandise, which said demand said defendant did then and there refuse and still continues to refuse to comply with, but has unlawfully retained possession of said merchandise, and all thereof, and has converted the same to his own use to the damage of plaintiffs in the sum of two hundred dollars lawful money of the United States.

Wherefore plaintiffs demand judgment of defendant in the sum
6 of two hundred dollars United States gold coin, together with their costs in this behalf expended.

JNO. S. MOSBY,
Attorney for Plaintiffs.

A. P. VAN DUZER,
Of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

M. J. Brandenstein, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action; that he has heard read

the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

M. J. BRANDENSTEIN.

Subscribed and sworn to before me this 10th day of August, 1889.
[SEAL.] P. G. BAUCH,
Notary Public.

(Endorsed:) Filed August 10, 1889. L. S. B. Sawyer, clerk.

7 *Summons.*

UNITED STATES OF AMERICA.

Circuit court of the United States, ninth circuit, northern district of California.

JOHN C. SIEGFRIED AND M. J. BRANDENSTEIN, doing business as partners under the firm name and style of Siegfried & Brandenstein, plaintiffs,
vs.
T. G. PHELPS, UNITED STATES COLLECTOR OF customs of the port and district of San Francisco, defendant.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

The President of the United States of America, greeting:

To T. G. Phelps, United States collector of customs of the port and district of San Francisco:

You are hereby requested to appear in an action brought against
8 you by the above-named plaintiffs in the circuit court of the United States, ninth circuit, in and for the northern district of California, and to file your plea, answer, or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons if served in this county, or, if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to recover from you, said defendant, the sum of two hundred dollars damages, alleged to have been sustained by plaintiffs by reason of the wrongful detention by you of certain merchandise, the property of plaintiffs, together with the costs of this action, all of which is more fully set out in the original complaint on file herein, to which reference is hereby made, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plaintiffs
9 will apply to the court for the relief demanded in the complaint herein.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of August in the year of our Lord one thousand eight hundred and eighty-nine and of our independence the 114th.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:)

UNITED STATES MARSHAL'S OFFICE,
Northern District of California:

I hereby certify that I received the within writ on the 15 day of August, 1889, and personally served the same on the 16 day of August, 1889, by delivering to and leaving with T. G. Phelps, United States collector of customs of the port and district of San Francisco, Cal., said defendant named therein, personally, at the city and county of San Francisco, Cal., in said district, a certified copy thereof, together with a copy of the complaint, certified to by A. P. Van Duzer, att'y for plaintiff, attached thereto.

SAN FRANCISCO, *August* 16, 1889.

J. C. FRANKS,
U. S. Marshal.
By D. PINKNEY,
Deputy.

10 Filed August 16, 1889.

L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

11 *Demurrer.*

Circuit court of the United States, ninth circuit, northern district of California.

JOHN C. SIEGFRIED AND J. M. BRANDENSTEIN, doing business as partners under the firm-name and style of Siegfried and Brandenstein, plaintiffs,
vs.
T. G. PHELPS, UNITED STATES COLLECTOR OF customs of the port and district of San Francisco.

Now comes the defendant in the above-entitled action and demurs to plaintiffs' complaint on file herein, and for grounds of demurrer says:

I.

That the complaint does not state facts sufficient to constitute a cause of action.

II.

That, notwithstanding the facts stated in said complaint, plaint-
12 iffs, as a matter of law, are not entitled to the relief sought.

Therefore defendant prays that said action may be dismissed and that he have and recover judgment for his costs in this behalf expended, and will ever pray.

JOHN T. CAREY,
United States Attorney, Attorney for Defendant.

I hereby certify that I am the defendant's attorney in the foregoing entitled action, and that in my opinion the foregoing demurrer is well founded in law.

JOHN T. CAREY,
United States Attorney, Attorney for Defendant.

(Endorsed:)

Service of a copy of the within demurrer is hereby acknowledged this 16th August, 1889.

A. P. VAN DUZER,
Att'y for Pl'ffs.

Filed August 26, 1889.

L. S. B. SAWYER,
Clerk.

13 *Order overruling demurrer, &c.*

At a stated term, to wit, the November term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California held at the court room in the city and county of San Francisco, on Monday, the 16th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The honorable Lorenzo Sawyer, circuit judge; honorable George M. Sabin, United States district judge, district of Nevada.

J. C. SIEGFRIED ET AL.
vs.
T. G. PHELPS, COLLECTOR OF CUSTOMS, ETC. } No. 10463.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer herein (argued before Judge
14 Sawyer), having been duly considered, and the opinion of the court having been read, it is ordered that the demurrer to the complaint herein be, and the same hereby is, overruled. And the defendant, stating that the facts of the case are fully set forth in the complaint and that he can not answer further thereto, let judgment be entered for plaintiffs, as prayed for, with costs.

15 *Judgment.*

UNITED STATES OF AMERICA.

Circuit court of the United States, ninth judicial circuit, northern district of California.

J. C. SIEGFRIED AND M. J. BRANDENSTEIN, copartners, &c., plaintiffs, *vs.* T. G. PHELPS, COLLECTOR, &C., DEFENDANT. } No. 10463.

The court having overruled the defendant's demurrer to plaintiffs' complaint herein, and upon the defendant stating that the facts of the case are fully set forth in the complaint and that he can not answer further, and the court having further ordered that judgment be entered herein in favor of plaintiff, as prayed for in the complaint, with costs:

16 Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that said plaintiffs do have and recover of and from said defendant the sum of two hundred dollars, damages, together with their costs in this behalf expended, taxed at——.

Judgment entered December 16, 1889.

L. S. B. SAWYER,
Clerk.

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 16th day of December, A. D. 1889.

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:) Filed December 16, 1889. L. B. S. Sawyer, clerk.

17 *Clerk's certificate.*

In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

J. C. SIEGFRIED ET AL. *vs.* T. G. PHELPS, &C. } No. 10463.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 16th day of December, 1889.

[SEAL.] L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed December 16th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

18 *Opinion.*

In the circuit court of the United States, ninth judicial circuit, northern district of California.

J. C. SIEGFRIED ET AL.
vs.
T. G. PHELPS, COLLECTOR, &C. } No. 10463.

This is a suit to recover the value of a certain shipment of tea, at a port in Japan to the port of San Francisco, arising out of a refusal of the collector to allow the tea to be delivered to the consignees without their presenting to him a consular invoice having endorsed thereon the declaration required to be made before the consul at the port of shipment and the consul's certificate required by sections 2854 and following of the Revised Statutes, or giving the bond to produce one at some future day, in pursuance of the provisions of section 2857.

The plaintiffs insist that the merchandise, being tea, which pays no duty, does not fall within the provisions of the statute which is in-
19 tended to apply to dutiable goods only; and it appears to me that this position is correct. There is nothing at all said about nondutiable goods, and the provisions are adapted only to dutiable goods, subject to either ad valorem or specific duties. The declaration provided for must state that the invoice "contains—if the merchandise mentioned therein is subject to ad valorem duty and was obtained by purchase—a true and full statement of the time when and place where the same was purchased, and the actual cost thereof and of all charges thereon * * * and, when obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same was procured or manufactured; and, if subject to specific duty, the actual quantity thereof." This requirement was manifestly intended to enable the collector to determine the amount of duties to be collected, and a form of declaration is prescribed by the statute adapted to each
20 mode of assessing duties, so that the collector can ascertain the value of the goods subject to ad valorem and the quantity of those subject to specific duties. But neither form is adapted to nondutiable goods, and there is no occasion to know, for the purposes of the revenue, either the value or quantity. Nondutiable goods are not mentioned, and no declaration is provided adapted to that class of goods. Which of the forms should be adopted when neither is prescribed and neither would fit the subject matter?

So the bond provided for in section 2857 is to be "double the amount of duty apparently due, conditioned for the payment of the duty which shall be found to be actually due thereon." As the goods show for themselves what they are and that they pay no duty, whatever the conditions of the bond, they no more fit the case than do the matters prescribed in the statement to be made before the consul in the case of dutiable goods.
21 Evidently the statute mentioned all the cases to which this declaration, certificate, and bond were intended to be made applicable.

To extend the requirements by loose construction or inference to goods that pay no duty would be to impose, in the aggregate, large burdens upon commerce without any corresponding benefit.

I do not think the Secretary of the Treasury is authorized by the statute to put any burdens upon commerce, in addition to those imposed by the statute itself. He is authorized to make regulations "not inconsistent with law;" to regulate the imposition and enforcement of the burden provided for by law, but not to impose others. Burdens imposed upon commerce, in addition to those imposed by statute, would be "inconsistent with law" and unauthorized. (See Balfour vs. Sullivan, 8 Sawyer, 649, and cases cited; Merritt vs. Welsh, 104 U. S., 695 and 700; Morrill vs. Jones, 106 U. S., 466.)

22 The Court of Claims, in Mosby vs. U. S., took this view when it held that the consul was entitled to recover a considerable amount paid into the Treasury under protest for fees collected for such certificates appended to invoices and statements of free goods, on the ground that these services performed, although in form official, were not official in fact or in law, and the United States had no concern with them; that it was a matter entirely between the owner of the goods, who voluntarily, without requirement of law, obtained and paid for the services, and the consul, who, in his own individual private character, voluntarily performed the service for the compensation received of the owner so paid of his own free will. The amount of the items in that single instance, $2,095, will afford some indication of the extent of the burden, in the aggregate, such a regulation by the Secretary would impose on commerce. In my judgment the collector unlawfully refused to deliver the tea, and is liable.

23 The demurrer to the complaint must be overruled, and it is so ordered.

SAWYER,
Circuit Judge.

(Endorsed:) Read in open court. Filed December 16, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

24 *Order allowing writ of error.*

At a stated term, to wit: The November term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Saturday, the 11th day of January, in the year of our Lord one thousand eight hundred and ninety.

Present: Honorable Ogden Hoffman, United States district judge.

JOHN C. SIEGFRIED ET AL.
vs.
T. G. PHELPS,
United States collector, &c.
No. 10463.

On motion of John T. Carey, esq., United States attorney, it is ordered that a writ of error herein be and the same hereby is allowed to the Supreme Court of the United States.

25 In the circuit court of the United States, of the ninth judicial circuit, in and for the northern district of California.

T. G. PHELPS, UNITED STATES COLLECTOR OF customs of the port and district of San Francisco, defendant and plantiff in error,
vs.
JOHN C. SIEGFRIED AND M. J. BRANDENSTEIN, doing business under the firm name and style of Siegfried & Brandenstein, plaintiffs and defendants in error.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing twenty-four pages numbered from 1 to 24, inclusive, are a full, true, and correct copy of the record and of the proceedings in the above and therein entitled
26 cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 31st day of January, A. D. 1890.

[SEAL.]

L. S. B. SAWYER,
Clerk of United States Circuit Court,
Northern District of California.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America,

To the judges of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between J. C. Siegfried and M. J. Brandenstein, copartners, &c., plaintiffs and defendants in error, and T. G. Phelps, United States collector of customs, &c., defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said defendant and plaintiff in error as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of January, in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fourteenth.

[SEAL.] L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the Northern District of California.

The above writ of error is hereby allowed.

SAWYER,
Judge of the Circuit Court of the United States, 9th Judicial Circuit.

28 *The answer of the judges of the circuit court of the United States of America for the northern district of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] L. S. B. SAWYER,
Clerk.

(Indorsed:) No 10463. United States Supreme Court. Timothy G. Phelps, U. S. collector, &c., defendant and plaintiff in error, vs. J. C. Siegfried and M. J. Brandenstein, copartners, &c., plaintiffs and defendants in error. Writ of error. Service of the within writ by a copy thereof is hereby acknowledged. Jno. S. Mosly, A. P. Van Duzer, attorneys for plaintiffs and defendants in error. January 28, 1890. Filed January 28, 1890. L. S. B. Sawyer, clerk.

29 UNITED STATES OF AMERICA, *ss:*

To John C. Siegfried and M. J. Brandenstein, doing business as partners under the firm name and style of Siegfried & Brandenstein, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, wherein T. G. Phelps, United States collector of customs of the port and district of San Francisco, is defendant and plaintiff in error and you are plaintiffs and defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States, of the 9th judicial circuit, northern district of California, this 23d day of January, A. D. 1890, and of the Independence of the United States the one hundred and fourteenth.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

30 (Indorsed:) No. 10463. In the Supreme Court of the United States. T. G. Phelps, U. S. collector of customs, &c., defendant and plaintiff in error, vs. John C. Siegfried and M. J. Brandenstein, co-partners, &c., plaintiffs and defendants in error. Citation. Service of the within citation by a copy thereof is hereby acknowledged. John S. Mosby, A. P. Von Duzer, attorneys for plaintiffs and defendants in error. Jan'y 28, 1890. Filed January 28, 1890. L. S. B. Sawyer, clerk.

(Indorsed on cover:) No. 655. T. G. Phelps, United States collector of customs, plaintiff in error, vs. J. C. Siegfried and M. J. Brandenstein, doing business as partners under the firm name and style of Siegfried & Brandenstein. N. California C. C. U. S. Filed February 19, 1890.

Supreme Court of the United States.

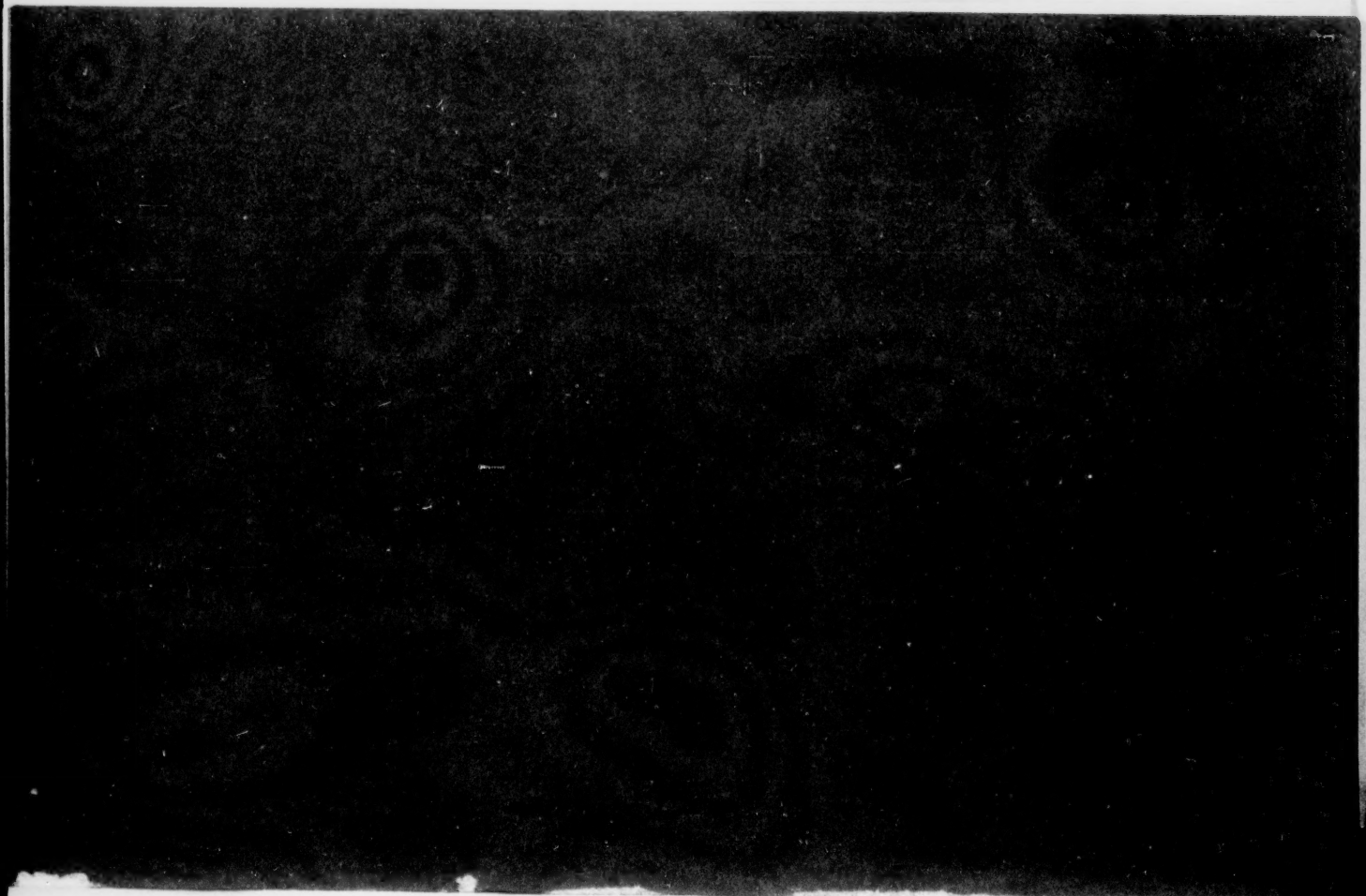
OCTOBER TERM, 1891.

T. G. PHELPS, COLLECTOR, &c., plaintiff in error,
vs.
J. G. SIEGFRIED AND M. I. BRANDENSTEIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.



Supreme Court of the United States.

OCTOBER TERM, 1891.

T. G. PHELPS, COLLECTOR, &C., PLAINTIFF IN ERROR,
vs.
J. G. SIEGFRIED AND M. I. BRANDENSTEIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

This action was brought by Siegfried and Brandenstein to recover the value of ten packages of tea imported by the plaintiffs in August, 1889.

The complaint avers that the merchandise in question is entitled to free entry, but that, although plaintiffs have done everything the law requires of them, the defendant, as collector of the port of San Francisco, has refused to allow entry of the said merchandise or to deliver the same to the plaintiffs except on the condition that plaintiffs should deliver to defendant a consular invoice from the

United States consul at Yokohama, Japan, declaring the cost or value of said merchandise in Japan, or should give a bond in $100 conditioned for the delivery of such an invoice within a prescribed time.

The complaint avers that there is no warrant of law for this action of the collector. (pp. 1, 2.)

The defendant demurred to the complaint (p. 4), but the court overruled the demurrer and entered judgment for the plaintiffs. (p. 5.)

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that it was not rendered for the defendant.

ARGUMENT.

The question presented by the record is whether invoices of merchandise entitled to free entry must conform to the requirements of sections 2853, 2854, 2855, 2860, as to the consular invoice, &c., which were in force in August, 1889, when the merchandise in question was imported.

This question is no longer an open one. It was decided by this court, in *United States* v. *Mosby* (133 U. S., 273, 288), that invoices of all merchandise imported from foreign countries, whether dutiable or not, must conform to the requirements of the above-named provisions of law.

The decision of Judge Sawyer on the demurrer was made on December 16, 1889, but the decision of this court in Mosby's case was not made until the 17th of the following January, 1890.

It thus appears that argument in support of the error assigned is unnecessary, and it is supposed the judgment must be reversed, with a direction to the court below to dismiss the action.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

T. G. PHILPS, COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

J. G. SIEGFRIED AND M. I. EISENSTEIN.

IN ERROR TO THE CIRCUIT COURT OF THE [illegible]
FOR THE NORTHERN DISTRICT OF [illegible]

BRIEF FOR THE PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

655

The Supreme Court, U. S.
FILED,
JAN 5 1892
JAMES H. MCKENNEY,
CLERK

No. 655.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1891.

PHELPS, COLLECTOR, ETC.,
Plaintiff in Error,

vs.

SIEGFRIED & BRANDENSTEIN

In Error to the Circuit Court of the United States for the Northern District of California.

BRIEF FOR DEFENDANTS IN ERROR.

SAN FRANCISCO:
ESTATE OF A. J. LEARY, PRINTERS, 402-408 SANSOME STREET.
1891.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term 1891.

PHELPS, COLLECTOR, ETC.,
Appellant,

vs.

SIEGFRIED & BRANDENSTEIN,
Appellees.

No. 655.

IN ERROR *to the U. S. Circuit Court for the Northern District of California.*

The defendants in error imported a quantity of tea from Japan which the Collector of the Port of San Francisco refused to deliver to them except on the condition of their presenting a consular invoice for it, or giving a bond.

This action was brought against the Collector for the unlawful conversion of the tea. The Court overruled defendant's demurrer to the complaint,

and gave judgment for the plaintiffs. The question presented is as to the right of a Collector of Customs to require a consular invoice for free goods.

Consular invoices are required for imported goods as the sworn evidence of the shipper as to their cost, or value in the foreign market, and as a guide to the appraisers in assessing duty on them. If the goods are free such a document is useless, as the Government has no interest in goods that pay no duty. The consular invoice is only designed to protect the revenue in the valuation of goods. As all imports have to pass through the Custom Houses such a document is not necessary to show whether goods are dutiable or free. They show that for themselves. The law also requires the manifest of the importing vessel, with a description of the goods as well as the bill of lading, to be deposited at the Custom House. Consular invoices for free goods are not required either by the letter or the reason of the statute. In fact they are excluded by both. Whether goods are dutiable or free must first be determined by the Collector at the port of arrival. If goods are without an invoice no prejudice can result to the Government from the omission of the shipper to forward one. As a condition of entry the Collector requires of the consignee a bond in double the amount of duty apparently due. (Sec-

tion 2857, R. S.) The plaintiff in error relies on the case of *U. S.* vs. *Mosby*, 133 U. S. 273, as decisive of this. It is admitted that that case is an authority in point. It is respectfully submitted that there was error in the judgment of the Court on that question, and that it should be overruled. The decision in that case seems to have been based on a construction of Sections 2853, 2854, 2855 and 2860, R. S., without reference to other sections that explain them. Section 2853 requires "all invoices of merchandise imported from any foreign country" to be in triplicate. But it does not say that there must be a triplicate consular invoice with every importation. So Sections 2854 and 2855 only prescribe what shall be the form and substance of an invoice whenever an invoice is required for the protection of the revenue. Section 2860 provides that "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of Sections 2853, 2854 and 2855," and the Court says that—"It is quite clear, therefore, that there can be no entry without a proper certified invoice." On the contrary, it would seem to be a more natural construction of that section to say that it should be read as only prescribing what shall be the form and contents of an invoice in every case where the law requires an invoice to be presented. It

declares that every invoice must conform to the requirements of Sections 2853, 2854, and 2855. But it does not say that no goods shall be entered without such an invoice. Read in connection with other sections of the Revised Statutes it is plain that this section refers to invoices that are required for dutiable goods. For instance, Section 2854 provides that on every invoice there must be endorsed a declaration of the cost or value of the goods, if subject to *ad valorem* duty; and of their quantity, if subject to *specific* duty. It is silent as to the form or contents of an invoice for *free* goods, which are clearly excluded on the principle *expressio unius est exclusio alterius*. If then an invoice is required for free goods what are the form and substance of it? The statute does not say. In the case at bar, suppose there had been a consular invoice presented that gave the cost of the tea in Japan, but was silent as to the quantity; or that only gave the quantity without the cost, would such an invoice have been sufficient? What section of the Revised Statutes prescribes the form of an invoice for free goods? Certainly § 2854 does not; it only refers to dutiable goods. As Judge Sawyer says: "The requirement was manifestly intended to enable the Collector to determine the amount of duties to be collected, and a form of declaration is prescribed by the statute adapted

to each mode of assessing duties, so that the Collector can ascertain the value of the goods subject to *ad valorem* and the quantity of those subject to *specific* duties. But neither form is adapted to non-dutiable goods, and there is no occasion to know, for the purpose of the revenue, either the value or the quantity. Non-dutiable goods are not mentioned, and no declaration is provided adapted to that class of goods. Which of the forms should be adopted where neither is prescribed and neither would fit the subject matter? So the bond provided in Section 2857 is to be '*double the amount of duty apparently due*,' etc. * * Evidently the statute mentioned all the cases to which this declaration, certificate and bond were intended to be made applicable."

Again: Section 2865 makes it a misdemeanor to pass, or attempt to pass, a false invoice through a Custom House; or, "with intent to defraud the "revenue," etc., introduce goods "subject to duty by law, and *which should have been invoiced*." The essence of the offense consists in defrauding the revenue.' Suppose an importer should present an invoice of tea of the declared value of $200, and it could be shown that it was worth ten times as much—would that be a misdemeanor, as there was no fraud on the revenue? Would there be a forfeiture of the tea? The Court seems to have overlooked Section 2857, which is a key to the meaning of Section 2865 on which

its decision was mainly based. Section 2857 provides that when in any case the triplicate transmitted by the consul to the Collector is not received at the port of arrival of the goods, they may be admitted to entry on the execution of a bond by the consignee "*in double* the amount *of duty apparently due, conditioned for the payment of the duty which shall be found to be actually due thereon.*" The Collector is then required to notify the consul to transmit to him a certified triplicate, "and the duty shall not be finally liquidated until such triplicate, or a certified copy thereof, shall have been received." The law never requires a vain thing. Suppose a cargo of tea arrives without a consular invoice. Then the Collector must seize it, if the law requires a consular invoice for such an importation, as the law only authorizes him to deliver dutiable goods to the consignee on his giving a bond to pay the duties "*apparently* due." But no duties are really or apparently due on the tea. What would be the condition of a bond given by a consignee of a lot of tea? The statute has prescribed no bond for such a case. It is the practice of Collectors in such cases to take a bond in the nominal sum of $100. But as the law gives him no authority to take such a bond and no discretion as to the amount, it is an idle form and void.

U. S. *vs.* Tingey, 5 Peters, 114.

U. S. *vs.* Rice, 4 Wheat. 246.

When all the provisions on the subject of consular invoices are read together as a whole it is clear that they were never intended to apply to free importations; they are in fact repugnant to such a construction. Sections 2842, 2843, 2845, 2846, 2847, 2848, 2849, 2854, 2857, all apply to invoices for dutiable goods. That consular invoices for free goods are worthless documents is shown by the following circular issued by the State and adopted September 13th, 1888, by the Treasury Department:

"DEPARTMENT OF STATE,

"WASHINGTON, September 7th, 1885.

"*Gentlemen:*—Complaint has been made to the "Department that consular officers in some places "require declaration to invoices of goods exported "to the United States to be in all cases verified "under oath. The Revised Statutes provide (Sec- "tions 2843, 2845,) that no merchandize subject "to *ad valorem* duty, belonging to a person not "residing in the United States, shall be admitted "to entry unless the invoice is verified by the "oath of the owner or one of the owners. In no "other case is verification under oath made essen- "tial. But Section 2862 provides as follows: 'All "consular officers are hereby authorized to require "before certifying any invoice under the provis- "ions of the preceding section satisfactory evi- "dence, either by the oath of the person present-

"ing such invoice, or otherwise, that such invoices "are correct and true.' * * There are large "classes of cases in which the administration of "an oath serves no good purpose in protecting the "revenues of the Government. Thus, for goods "on the *free* list an oath is plainly unnecessary. "* * Only where goods are subject to *ad* "*valorem* duty is the oath of the owner deemed "of any special value, etc. * * (1) No oath "will hereafter be required for the verification of "invoices of goods on the *free* list, or subject to "specific duty only, etc., etc. * *

"I am, etc., etc.,

"T. F. BAYARD."

If it is immaterial whether a document is true or false why require it? The State and Treasury Departments prohibit a consul by this circular from inquiring into the integrity of an invoice for free goods. They have no dispensing power in such a case. Whenever the law requires a consul to certify an invoice it also requires him as far as practicable to require "satisfactory evidence, either by the oath of the person presenting such invoices, or otherwise, that such invoices are correct and true." Section 2862, R. S. If the law does not require the invoice to be true it does not require the invoice,

II.

In *U. S.* vs. *Mosby, supra*, the Court again says: "In addition to this, it is entirely clear that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty is a question which could not be left to the determination of a consul." With all due respect it seems to be a *non sequitur* to say that a consul determines that imports are free of duty in a case where he is not called on to perform any official duty in regard to them. If the foreign shipper presents his invoice to him for authentication he certifies to his declaration, no matter whether they are free or dutiable. The question of their dutiability is for the Collector and not the consul to determine. If, however, as in the case at bar, the goods are shipped without a consular invoice, the consul takes no part in the transaction, and in all probability never hears of it. It is not a consul's duty to hunt up shippers of goods to the United States for the purpose of certifying their invoices. They bring their invoices to his office to be certified and recorded. But if the shipper does not get an invoice that is a matter between the Collector and the consignee of the goods. The Collector determines whether they are free or dutiable. If there is no consular invoice with them he delivers the goods to the consignee on his executing a bond "in double the

amount of the duty apparently due, etc." Section 2857. As the consul never hears of a shipment where he certifies no invoice, it is hard to see how it is left to him to determine whether the goods are free or dutiable, or where his judgment comes in. The case at bar shows the fallacy of that idea.

Respectfully submitted,

JNO. S. MOSBY.